United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

To Be Argued By
JAMES F. RITTINGER

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In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

74-2543

ROBERT L. CARDILLO,

Plaintiff-Appellant,

-against-

DOUBLEDAY & COMPANY, INC., THOMAS C. RENNER, VINCENT TERESA and FAWCETT PUBLICATIONS, INC., d/b/a TRUE MAGAZINE,

Defendants-Appellees.

On Appeal from the United States District Court

For The Southern District of New York

BRIEF FOR DEFENDANTS-APPELLEES

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Counter-Statement of Issues Presented for Review.

1. Did Gertz v. Robert Welch, Inc., 418 U.S. 323, (1974) alter the law in New York with respect to the test for liability in "public interest" libel actions?

2. In any event is plaintiff-appellant a "public figure" so that appellees are entitled to the protection afforded defendants in libel actions pursuant to New York Times v. Sullivan, 376 U.S. 254 (1964) and its progeny?

3. Were the allegedly libelous publications made by appellees with "actual malice"?

4. In any event, should the complaint in this action be dismissed because appellant as a convicted felon serving a jail sentence has no reputation to protect and therefore he is "libel-proof"?

5. Is this libel action particularly appropriate for disposition by way of summary judgment?

Counter-Statement of the Case

A. Opinion and Judgment Appealed:

Plaintiff-Appellant Robert L. Cardillo ("appellant") appeals from an unreported opinion and judgment (A 36, p. 1-8 and A 37*) dated November 15, 1973 of the United States District Court of the Southern District of New York (Hon. Murry L. Gurfein) which granted summary judgment pursuant to Federal Rule of Civil Procedure 56

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* "A" refers to numbered documents as they appear in appellant's Appendix; "A 36, p. 1-8" refers to page numbers from the opinion of the court below which is the only document reproduced in said Appendix; "S" refers to page references from the Supplemental Joint Appendix, which consists of the papers submitted by appellees in support of their motion for summary judgment.

and dismissed appellant's action for libel against defendant-appellees, Doubleday & Company, Inc. ("Doubleday"), Thomas C. Renner ("Renner"), Vincent Teresa ("Teresa") and Fawcett Publications, Inc. d/b/a True Magazine ("Fawcett") (hereinafter collectively referred to as "appellees").

B. Facts:

This action, which seeks damages for publication of allegedly libelous statements appearing in a book entitled MY LIFE IN THE MAFIA (the "book"), written by appellees Renner and Teresa, published by appellee Doubleday and serialized by appellee Fawcett in its March and April, 1973 issues of True Magazine, was instituted on April 25, 1973 (copies of the book and the True Magazine serializations were handed up to the court on the return of appellees motion for summary judgment and are part of the record herein). The complaint (S 13) seeks the sum of $4,000,000 as compensatory damages against all the appellees and an additional $4,000,000 as punitive damages against appellee Teresa. Doubleday, Fawcett and Teresa answered the complaint (A 2 and S 27, A 7). Their answers generally deny the material allegations pleaded in the complaint and by way of affirmative defense allege that with respect to the publication, appellees were acting within the rights guaranteed to them by the first amendment of the

Constitution of the United States and that all matters contained in the book or any serialization thereof which may refer to appellant were protected by the first amendment. Appellee Renner was never served with process in this action, but he appeared voluntarily for purposes of joining the motion for summary judgment.

As noted by the district court, in its opinion granting summary judgment, after joinder of issue "plaintiff ... conducted extensive discovery of defendants" (A 36, p. 3) which included notices to admit directed to Doubleday and Fawcett (A 5), one set of written interrogatories addressed to Fawcett (A 18), one set addressed to Doubleday (A 17), two sets addressed to Renner (A 32 and 33) (these were not answered because appellant never made Renner a party to the action) and five sets of interrogatories addressed to Teresa (A 14, 24, 25, 26 and 28). (Teresa answered the first three sets of interrogatories (S 105 and 119) prior to moving for summary judgment.) As to all this discovery the district court concluded that appellees "have furnished full and complete responses and answers to plaintiff's notices to admit and interrogatories, about which plaintiff has not objected" (A 36, p. 3).

The statements which give rise to this action are enumerated in paragraphs 5(a) through (o) of the

complaint (S 14-17). Generally, these statements concern appellant's various criminal activities during the years he was acquainted and involved with Teresa. Some of these activities resulted in appellant's arrest and conviction. (See infra.)

After appellant had conducted the discovery enumerated above, all appellees moved for summary judgment dismissing the complaint on September 26, 1973. The basis for this motion was that the publications which were alleged to be libelous of the appellant were all of legitimate public interest and concerning a public figure and that therefore as a matter of law said publications could not have been made by the appellees with "actual malice"--that is with knowledge of their falsity or with reckless disregard of whether they were false or not. Thus, pursuant to New York Times v. Sullivan, supra, and subsequent precedent, the complaint must be dismissed.

Appellees also moved on the additional grounds that even if appellant could establish a prima facie cause of action for libel, the complaint would have to be dismissed because appellant could not be entitled to monetary damages since he was admittedly a conficted felon, incarcerated in a federal penitentiary, who was serving

a 21 years prison sentence and thus was "libel proof" (A 36, p. 7).

In support of appellees motion for summary judgment appellees submitted affidavits of Doubleday's attorney, Robert M. Callagy (S 4), Doubleday's senior editor, Thomas Congdon (S 83), the editor in charge of the book, Fawcett's senior assistant editor, William Iversen (S 78) who was in charge of the serialization, the authors Renner (S 93) and Teresa (S 101)*, and present or former federal strike force prosecutors Edward Harrington (S 129), Gary Betz (S 131 and Paul R. Kramer (S 133), all of whom had knowledge of Teresa's excellent record as a government witness and knowledge of appellant's criminal past.

In opposition to appellees' motion for summary judgment, appellant filed three letters (A 33, 34 and 35). Although appellees did not receive copies of these letters, they apparently contain appellant's opposition to appellees' motion.

By opinion dated November 15, 1973 (A 36, p. 1-8), the district court granted summary judgment and dismissed appellant's complaint on the grounds that the allegedly libelous statements concerned matters of legitimate public interest and, as a matter of law, were not published

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* As for the reason that Teresa did not verify his affidavit in the normal manner, see the verification at S 104.

with "actual malice". Because of the "public interest" finding, the district court held that it was not necessary to determine whether plaintiff was a "public figure" or if he was "libel proof" because of his extensive criminal record and present incarceration (A 36, p. 7).

Appellant filed a notice of appeal on December 6, 1973 and apparently also moved before the district court for leave to appeal in forma pauperis. By decision dated December 18, 1973, the district court certified that appellant's appeal "is frivolous and therefore not taken in good faith for substantially the reasons stated in my opinion dated November 15, 1973" (A 38). From that date, December 18, 1973, appellees received no further notice from appellant until December 4, 1974 when this Court's order dated November 26, 1974, was received which granted permission to appeal in forma pauperis and to obtain assigned counsel.*

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* It should be noted that appellant totally ignored the time and notice requirements of Rules 24 and 25 of the Federal Rules of Appellate Procedure in his application to the Court of Appeals for leave to appeal in forma pauperis. Moreover, a person taking an appeal in forma pauperis is subject to the same rules as ordinary appellants. (Barkeij v. Ford Motor Co., 230 F. 2d 729, 731 (9th Cir. 1956)). Therefore, on this basis alone, the present appeal should be dismissed.

The district court had no difficulty in determining that the subject of the book both generally and as it relates to appellant is "one of great public interest" (A 36, p. 3). Appellee Teresa was the highest ranking organized crime figure ever to tell his story publically. Appellant is a convicted felon with whom Teresa became associated at the time of his rise to power in organized crime in the New England area. In order to truly understand organized crime one must have an insight into its members and associates and therefore, appellant, as an admitted criminal whose life has been a history of crime, qualifies as a public figure. Indeed, whether or not the statements about which appellant complains are of "public interest" is not an issue on this appeal because appellant has not contested that aspect of the district court's finding which so held.

The affidavits submitted below by appellees all state that they believed the publications made about appellant were true and that they continue to believe them to be true. (S 82, 88, 100 and 102-103) Teresa has affirmed this in his affidavit (S 102-103) and Renner, in his, has outlined the substantiation for each of the alleged libelous statements. (S 96-100) Documentary evidence is also available to show that many of these statements are true (see S 93- 100 and

S31-77). In fact, as stated earlier, appellant is presently serving a 21 year jail sentence for the criminal conviction of certain of the activities attributed to him which he now claims are false and libelous. Documentary substantiation showing appellant to be a habitual criminal with a propensity for the type of activities which the book attributes to him will be discussed below. At the very least, nothing in the book attributed to appellant is any more heinous than the activities the conviction for which he is presently incarcerated.

The procedure which Doubleday, Fawcett and Renner employed to insure the truth of all the statements in the book and the serialization*, despite appellant's protests to the contrary, are reviewed in the affidavits submitted by these appellees (S 78, 83 and 93). Briefly summarized, before publishing the book Doubleday and Fawcett became familiar with the background and reputation of both appellees Renner and Teresa (S 84-85, S 81-82). They were aware that Teresa had testified about organized crime before a United States Senate Subcommittee and that his testimony had resulted in approximately 45 convictions at criminal trials (S 85, 102 and 130). Renner's literary background and qualifications as an investigative reporter were also the subject of extensive study. (S 84-85, S 81-82)

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* It should be emphasized that there are only two references to the appellant in the True Magazine serializations, both of which are substantiated by independent sources beyond Teresa's word. (Iverson aff'd. S 79-80).

Doubleday and Fawcett were aware that Renner had 16 years experience in the field of journalism, at least six of which had been devoted solely to organized crime. Further in his preparation of the manuscript for the book, Renner did not rely solely on Teresa's statements (S 97-100). After his lengthy interviews with Teresa and his verification of the manuscript against written documentation which was available to him, Renner submitted the manuscript to numerous specialists in the field of organized crime on both State and Federal levels, most of whom are mentioned in the Renner affidavit (S 98-99), for their review from the standpoint of accuracy. All of these individuals concurred in the truth of Teresa's story and, indeed, Federal Strike Force prosecutors who were intimately involved with Teresa (Betz prosecuted appellant for crimes for which he is presently incarcerated (S 131)) voluntarily submitted affidavits attesting to their belief in the accuracy and truth of appellees' book (S 129-1331).

In spite of the above, Doubleday, Fawcett and Renner did not publish simply based on these facts, as stated in their respective affidavits. For example, before publication, Doubleday submitted the entire manuscript of the book to its attorneys for a review of problems that might be presented in the areas of libel and invasion of

privacy (S 86, S 9). Because of the nature of the book and the fact that numerous living persons were named, a meeting was held with Doubleday's attorneys at which Renner presented various substantiation for the potentially libelous statements contained in his book (S 9, 86, and 98). At this time appellant was specifically discussed (S 9, 86 and 98). His criminal record was reviewed and prior testimony given by Teresa and other witnesses before congressional committees relating to plaintiff was obtained and reviewed. (S 9, S 86-7) In light of the documented evidence about other episodes concerning appellant in the book, the stories which Teresa related about from his own personal experience with appellant became more than believable. This was additional proof to Doubleday and Fawcett that the book contained accurate and verified accounts and that the authors were relating only the truth.

Aside from the facts contained in the Renner and Teresa affidavits which show that the statements about the plaintiff contained in the book are true, the following additional documentary evidence (most of which was furnished by Renner at his meeting with Doubleday's attorneys following their review of the book for libel) conclusively establishes that it was more than reasonable for the appellees to believe that the statements about the appellant were true.

(a) Attached to the Callagy affidavit as Exhibit C (S 31-38) is a record of appellant's criminal arrests, indictments and convictions. (This record, which reveals an habitual life devoted to the commission of numerous crimes, is complete only through 1967. Not included in this list are the indictments and convictions for which the appellant is presently incarcerated.)

(b) Attached to the Callagy affidavit as Exhibit D (S 39) is a copy of appellant's answer to interrogatories propounded by appellees. Therein at Answer No. 4 (S 40) appellant admits convictions for stolen securities and bail jumping in the United States District Court for the Southern District of Florida; a conviction for bail jumping in the District of Maryland; and a conviction for conspiracy and interstate transportation of stolen securities in the District of New Hampshire. In Answer No. 10 (S 41) appellant admits to having been convicted of receiving stolen property, mail fraud and other "infractions" and having been charged with violations of the "True Name" law in defraud of inns and motels and shoplifting. Moreover, in Answer No. 14 (S 42-43)

appellant admits that from between 1963 to 1969 he was friendly and well acquainted with Teresa; was well aware that Teresa was involved in "petty deals, minor crimes and small swindles", and further admits that he was "involved with Teresa in several minor crimes". In view of these admissions, the assertion in appellant's brief that there is no substantiation for the statements made about him in the book is incredible.

(c) Handed up to the district court and therefore part of the record herein is a copy of the transcript of the testimony given by Teresa before the McClellan Senate Subcommittee in which appellant's name is repeatedly mentioned in connection with various criminal activities. Teresa's testimony appears between pages 773-830.

(d) Attached to the Callagy affidavit as Exhibit E (S 54) is a copy of the transcript of the testimony of Joseph Barboza, an informer, given before the United States Congressional Select Committee on Crime, which includes a reference to appellant's activities in regard to illegally fixing horse races at Suffolk Downs, Massachusetts.

(e) Attached to the Callagy affidavit as Exhibit F (S 57) is a copy of a Federal Bureau of Investigation report dated April 6, 1970 which outlines testimony provided by Teresa relative to appellant's criminal activities involving securities fraud violations. The appellant was subsequently indicted and convicted as a result of testimony and information provided by Teresa. (Kramer aff'd., S 130, Betz aff'd., S 131)

(f) Attached to the Callagy affidavit as Exhibit G (S 60) is a copy of a report prepared by investigators from the Office of the Massachusetts Attorney General which refers to appellant's involvement in crime, specifically the receiving of stolen property, beginning as early as 1961 (see S 64 thereof).

(g) Attached to the Callagy affidavit as Exhibit H (S 74) is a copy of the cover sheet to the compilation of Teresa's record as a witness which was compiled by Edward F. Harrington (S 130). In addition to showing the crimes for which appellant has most recently been indicted and convicted as a result of testimony by or information

provided by Teresa, the cover sheet of this compilation indicates that appellant was indicted by the Commonwealth of Massachusetts for conspiracy to fix horse races. (S 74)

In short, it is unequivocally clear that the foregoing written documentation demonstrates appellant's extraordinary propensity for crime and renders it virtually impossible as a matter of law that the appellees could have published any of the statements about the appellant with actual malice.

Beyond this, however, is the fact that because of appellant's established reputation as an habitual offender and by virtue of his present incarceration, none of the statements contained in the book could damage appellant's reputation, obviously a necessary element in any libel action.

SUMMARY OF ARGUMENT

The court below properly held that all publications concerning appellant concerned matters of legitimate public interest and that as a matter of law these publications could not have been made with actual malice--that is with knowledge of their falsity or with reckless disregard of the truth. Thus, pursuant to the rule first enunciated in New York Times v. Sullivan, supra,

the court below was correct in granting summary judgment and dismissing the complaint.

In this brief, appellees establish that the opinion in Gertz v. Robert Welch, Inc., supra (which the United States Supreme Court handed down after dismissal but before leave to appeal was granted herein), did not alter the constitutional libel standards of New York State with respect to "public interest" libel actions (appellant concedes that the publications were in the "public interest"). Instead, Gertz held that in such libel actions, a state may impose a less demanding standard. In the absence of a New York Court of Appeals decision which permits a lesser standard to be applied than the actual malice one previously adopted by New York's highest court, New York law still requires a showing of "actual malice". Furthermore, in any event as a matter of law plaintiff is a "public figure" and therefore the same constitutional libel defenses are applicable.

In addition, it is shown that the district court was correct as a matter of law in holding that the publications could not have been made with "actual malice".

Penultimately, appellees demonstrate that appellant's complaint must be dismissed because as a matter of law nothing in the book or serialization could have damaged his reputation and he is "libel-proof".

Finally, summary judgment is especially appropriate in disposing of constitutional libel actions.

ARGUMENT

POINT I

GERTZ V. ROBERT WELCH, INC., DID NOT MANDATE A RETRACTION OF THE ACTUAL MALICE STANDARD IN PUBLIC INTEREST LIBEL ACTIONS AND THEREFORE THE LAW IN NEW YORK IS STILL GOVERNED BY THE ACTUAL MALICE STANDARD.

In New York Times v. Sullivan, 376 U.S. 254 (1964), the Supreme Court imposed limitations on state libel laws and held that the freedoms of speech and of the press guaranteed by the First and Fourteenth Amendments prohibit "a public official from recovering damages for a defamatory falsehood relating to his official conduct, unless he proves that the statement was made with 'actual malice',-- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (376 U.S. at 279-80)

In 1967 the Supreme Court extended the New York Times rule to private citizens who became "public figures" by reason of their involvement in public events or controversies, such as the coach and atnletic director of a college who was

charged with fixing a college football game. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

Next, the Supreme Court held that the New York Times rule applied whenever the alleged defamatory statements relate to the plaintiff's involvement in a matter of public or general concern, regardless of whether the plaintiff is a "public official", a "public figure", or a private individual. Rosenbloom v. Metromedia, 403 U.S. 29 (1971) (hereinafter and previously referred to as the "public interest" standard or test). The "public interest" test was adopted unanimously by the New York State Court of Appeals in Kent v. City of Buffalo, 29 N.Y. 2d 818 (1971).

On June 25, 1974, the Supreme Court handed down its opinion in Gertz v. Robert Welch, Inc., supra. In Gertz, the Supreme Court withdrew from the mandatory position of the plurality taken in Rosenbloom, supra, concerning the public interest standard. However, it is unequivocally clear from a reading of the Gertz opinion that the Supreme Court did not mandate a retraction of the public interest standard, but held only that each state may impose a less demanding standard than proof of actual malice when a private individual who has been involved in a public event sues for libel:

> "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual ... .
>
> "Our accomodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehoods on a less demanding showing then that required by New York Times." (emphasis added) (418 U.S. at 347-348)

Indeed, appellant accepts this descretionary holding of Gertz in his brief where he discussed the effect of the Gertz decision:

> (3) If plaintiff is a "private person, then the common law is free to grant recovery on any basis other than one of absolute liability." (Emphasis added) (br. p. 17).

Appellant states in his brief (br. p. 2) that the issue presented on this appeal is whether this Court should "remand to the District Court for further proceedings in light of Gertz v. Welch [citation omitted] which rejected the test for liability used by the District Court."

Initially, nowhere in his brief does appellant challenge the holding of the court below that the statements about him in appellees' publications concern

matters of legitimate public interest. Indeed, it would be impossible for him to do so in light of the authority which holds that statements concerning criminal activity, and especially organized crime, are matters of legitimate public interest (See e.g. Arizona Biochemical Co. v. Hearst Corp., 302 F. Supp. 412 (S.D.N.Y. 1969); Schwartz v. Time, Inc., 71 Misc. 2d 769 (Sup. Ct., N.Y. Co. 1972); Alpine Construction Co. v. Demaris, 358 F. Supp. 422 (N.D. Ill. 1973); Kent v. City of Buffalo, supra.

Likewise, there is no dispute that New York State substantive law governs this diversity libel action. Appellant so contends in its brief ("We found only one case in New York State--the substantive law which guides this diversity case--... "(Br. p. 21)) and appellees concur in this assertion. As previously stated, the law in New York is the "public interest" standard as applied by the court below which requires a showing of "actual malice" by an alleged private individual suing for libel who is involved in a matter of public interest. This is well established by a long line of New York Court of Appeals cases. (Kent v. City of Buffalo, supra, cited in the opinion of the court below at p. 4); Frink v. McEledowney, 29 N.Y. 2d 720 (1971); Twenty-five East 40th Street Restaurant Corp. v. Forbes, Inc., 30 N.Y. 2d 595 (1972); Trails West, Inc. v.

Wolff, 32 N.Y. 2d 207 (1973). The New York Court of Appeals has not retracted from this "public interest" standard since Gertz and there is no indication that it intends to do so. Indeed, the "public interest" test was the law in New York even prior to the Supreme Court's adoption of this test in Rosenbloom. As stated in Commercial Programming Unlimited v. CBS, Inc., Misc. 2d , N.Y.L.J., Vol. 173, No. 57, March 25, 1975, p. 2, col. 5 (Sup. Ct., N.Y. Co., 1975):

> "There is, accordingly, ample justification for the statement that 'New York courts also held, even before Rosenbloom, that communications involving matters of public concern must fall within the protection of the New York Times privilege. (Schwartz v. Time, Inc., 71 Misc. 2d, 769, 771 (Sup. Ct., N.Y. Co., 1972, Culkin. J.D.)

(see also Garfinkel v. Twenty-First Century Publishing Co., 30 A.D. 2d 787, (1st Dep't. 1968), appeal dismissed 22 N.Y. 2d 970 (1968)); Lloyds v. United Press International, Inc., 63 Misc. 2d 421 (Sup. Ct., N.Y. Co., 1970); All Diet Food Distributors, Inc. v. Time, Inc., 56 Misc. 2d 821 (Sup. Ct., N.Y. Co., 1967); Fotochrome, Inc. v. New York Herald Tribune, Inc., 61 Misc. 2d 226 (Sup. Ct., Queens Co., 1969); Cohen v. New York Herald Tribune, 63 Misc. 2d 87 (Sup. Ct., Kings Co., 1970).

Thus, the recent New York County Supreme Court decision, Commercial Programming Unlimited v. CBS, Inc., supra,

involved the identical issue presented on this appeal, i.e., whether the New York Times actual malice standard is still applicable in New York State after Gertz in libel actions by private individuals when the statements concern matters of public interest. The Court, in reviewing the effect of Gertz, stated:

> "Plaintiffs contend that, inasmuch as the Gertz decision declared the New York Times rule inapplicable to private individuals, the law to be applied here in New York law pre-New York Times, which provided a test of "fair comment". [citation omitted] This argument, however, misconceives the holding of Gertz. Gertz did not overrule New York Times; rather it merely overturned the pronouncement in Rosenbloom that the federal constitution requires extension of New York Times to matters of public interest, even if concerning private individuals.
>
> * * * *
>
> "Accordingly, this court concludes that publications which concern matters of public interest--and those involved here unquestionably do--are subject to a qualified privilege and are actionable only upon a showing that they were made "with knowledge that * * * [they were] false or with reckless disregard of whether * * * [they were] false or not" (New York Times Co. v. Sullivan, supra, 376 U.S. at p. 280. (Emphasis added)

Similarly, Safarets, Inc. v. Garrett Company, Inc., --Misc. 2d--, 361 N.Y.S. 2d 276, (Sup. Ct., Broome Co., 1975) involved a libel action by a pet shop which had been accused of inhuman treatment of birds kept in the shop in a letter published by the defendant newspaper. The defendant newspaper

argued that the publication involved a matter of public interest and that the complaint should be dismissed because plaintiff as a matter of law could not prove "actual malice". The New York Supreme Court was again faced squarely with the issue of whether Gertz required a lessening of the "public interest" standard and held as follows:

> "The question then arises as to how the present law of New York has been affected by this holding that States may impose a less demanding standard of liability for libel than that required under New York Times doctrine where private individuals are concerned in matters of general or public interest. Apparently the States can adopt any reasonable standard except liability without fault. ...
>
> "A review of New York law indicates that the Court of Appeals has adopted the Rosenbloom rule [citations omitted] ... . Though the Gertz case permits the States to adopt standards less demanding than those required by New York Times where private individuals are involved in matters of public interest, it does not hold that States may not adhere to a more demanding standard such as that standard laid down in Rosenbloom. ...
>
> "We cannot anticipate whether the Court of Appeals will abandon the Rosenbloom doctrine or, if it should, what standard of care it might adopt. Therefore, we are bound to adhere to the Rosenbloom rule as adopted by the Court of Appeals." 361 NYS 2d at 279-80.

Thus, Safarets held that the "public interest" standard as applied by the court below is the law in New York and it will remain the law until such time as the New York Court of Appeals overrules the cases cited above which

adopted this standard. Likewise, in Jones v. Gates-Chili News, 78 Misc. 2d 837 at 840 (Sup. Ct., Monroe Co., 1974), cited by appellant, Mr. Justice Livingstone held that "Gertz has not changed the law since my opinion in Vinci v. Gannet Co., (71 Misc. 2d 146)". A reading of Vinci reveals that in that case the New York Supreme Court applied the same "public interest" test applied by the court below.

(See also, AAFCO Heating and Air Conditioning Company v. Northwest Publications, Inc., 321 N.E. 2d 580 (Indiana Ct. of App., 1974) holding Gertz did not alter public interest standard in Indiana.)

Finally, one of the first interpretations following the Gertz opinion merits comment because of its close analogy to the instant situation. This commentator states:

> "Certainly it is safe to contend that they [the states] are left with their libel laws as existing prior to the Rosenbloom decision of 1971. ... Gertz says not a word about requiring the states to overturn these decisions. In fact, Gertz gives the states every right just to leave them alone. (Wilson, "What Hath 'Gertz' Wrought in Libel?" New York Law Journal, September 30, 1974, p. 1, col. 3 at p. 5, col. 1-2).

As previously stated, New York had adopted the Rosenbloom "public interest" standard even prior to the Rosenbloom decision. Moreover, this commentator, like the

New York Supreme Court in Safarets, opines that the state court decisions which emanated as a result of Rosenbloom remain the law until such time as each individual state overrules its prior decisions:

> "Furthermore, even post-Rosenbloom decisions, it can be argued, are still very much the decisional law of many states, Gertz notwithstanding. That these holdings were decided under the constitutional gun of the Supreme Court rather than by unmandated evolvement by lower courts by no means dilutes their precedential value. Not surprisingly post-Rosenbloom holdings define a "public interest", actual malice standard in a manner remarkably similar to the lower court holdings before the 1971 decision. For example, Mafia and organized crime activities, both before and after, were held to be in the "public interest" category. Other post-Rosenbloom 'public-interest' cases included allegedly defamatory articles on prison conditions illegal distribution of alcohol to minors, diploma mill rackets and the arrest of the passer of a bad check.
>
> "This is not to say that some states might decide under Gertz's new freedom to move back from the actual malice requirement for matters of 'public interest'. But opponents of such departures will have on their side precedent and the strong policy imperative of what the Supreme Court in Sullivan referred to as 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." Id. at Col. 2.

Of course, it could never be argued that New York adopted the "public interest" test under the "gun" of Rosenbloom since it was already the law in this state prior to Rosenbloom.

In short, therefore, Gertz was a discretionary holding which in no way by itself could or did alter the law in New York with respect to the public interest defense. Therefore, as a matter of law, the decision of the court below that the "public interest" standard was applicable to the instant case should not be remanded for further consideration.

POINT II

THE ACTUAL MALICE STANDARD APPLIED BY THE COURT BELOW IS ALSO APPLICABLE BECAUSE APPELLANT IS A "PUBLIC FIGURE".

After holding that all publications in the book concerning appellant were of a legitimate public interest, the court below was not required and therefore did not specially decide if plaintiff was a "public figure", although it did imply as much (A 36 , p. 4). There can be no question that Gertz does not affect the defenses available to a "public figure" in a libel action and appellant confirms this in his brief:

> "4. If plaintiff is deemed to be a public official or figure, then the Times v. Sullivan malice rule is to be applied. (App. br., p. 17)

For the very same reasons which caused the district court to conclude that appellees publications were a matter of

public interest, appellant is unequivocally a "public figure". By voluntarily engaging in a life of crime with Teresa, as appellant's record establishes and his own answers to appellees interrogatories confirms (S31-53), appellant became a public figure, whose close association with, if not membership in, organized crime projected himself into the public spot light. His activities and the influence he had on Teresa and vice versa were ingredients necessary to a presentation about organized crime. Thus, if the 12 year old plaintiff in Jones v. Chili News, Inc., supra*, who committed one alleged crime for which he was never prosecuted, is a public figure, certainly appellant who was a former member of, or at least closely associated with, organized crime having an extensive criminal and jail record, must be one too.

Appellant's only argument as to why he is not a public figure - he claims that he did not "voluntarily" thrust himself into public spotlight - is patently without merit (app. br. p. 19). Obviously, this is a distortion of the term "voluntarily" as intended by the United States Supreme Court.

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* Appellant claims Jones is distinguishable because appellant denies the truth, as does every libel plaintiff, of the statements contained in appellees book--as if the same was not the case in Jones.

This is what Jones demonstrates. For if appellant's interpretation of "voluntary" were accepted, none of the assassins, like Lee Harvey Oswald, James Earl Ray or Sirhan Sirhan, would be public figures because certainly they too did not intend to be caught and have their crimes reported to the public. Indeed, no criminal would ever be a public figure under this peculiar interpretation. Likewise, would anyone seriously contend that, under Gertz, Howard Hughes is not a public figure because he does not like to see his name in print and thus has not thrust himself "voluntarily" into a public controversy. A list of similar examples abounds.

The following cases which have held individuals to be "public figures" establish beyond preadventure of a doubt that appellant is a public figure: Curtis Publishing Co. v. Butts, supra, (college coach and athletic director); Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6, (1970) (urban real-estate developer who was negotiating with city officials to obtain zoning variances); Walker v. Pulitzer Publishing Co., 394 F. 2d 800 (8th Cir. 1968) (retired army general); Dacey v. Florida Bar, Inc., 427 F. 2d 1292 (5th Cir. 1970) (author of best-selling book relating to methods of avoiding probate); Time, Inc. v. Johnston, 448 F. 2d 378 (4th

Cir. 1971) (former professional basketball player who had retired 12 years before allegedly slanderous statement); Tripoli v. Boston Herald-Traveler Corp., 268 N.E. 2d 350 (1971) (suspect in $1.5 million mail robbery); Lloyds v. United Press International, Inc., 63 Misc. 2d 421, 311 N.Y.S. 2d 373 (trainer-driver of standard bred horses); Cepeda v. Cowles Magazines and Broadcasting, Inc., 392 F. 2d 417 (9th Cir. 1968), cert. denied, 393 U.S. 840 (1968),(public figures included "anyone who is famous or infamous because of who he is or what he has done." Id at 418); Time, Inc. v. McLaney, 406 F. 2d 565 (5th Cir. 1969), cert. denied, 392 U.S. 922 (1969), (underworld figures); Pauling v. Globe-Democrat Publishing Co., 362 F. 2d 188 (8th Cir. 1966), cert. denied, 388 U.S. 909 (1967), (a professor); Arber v. Stahlin, 10 Mich. App. 181, 159 N.W. 2d 154 (1968), (political party workers); Gilberg v. Goffi, 21 App. Div. 2d 517, 251 N.Y.S. 2d 823 (1964), aff'd., 15 N.Y. 2d 1024, 260 N.Y.S. 2d 29 (1965), (the law partner of a mayor of a city); Grayson v. Curtis Publishing Co., 72 Wash. 2d 999, 436 P. 2d 756 (1967), (a head football coach).

Thus, as a matter of law, appellant is a "public figure" and Gertz mandates an application of the same actual malice standard applied by the court below.

POINT III

AS A MATTER OF LAW, THE ALLEGED LIBELOUS PUBLICATIONS WERE NOT MADE WITH ACTUAL MALICE

Having determined that publications about which appellant complains were in the public interest (and it being established that appellant is a public figure (see Point II), the court below properly determined that there could be no liability unless the publications were made with actual malice. (A36, p.4) The district court then reviewed the extensive and meticulous substantiation process which all appellees performed and concluded:

> "Their [defendants] investigations were certainly adequate, and negate the sort of recklessness that sanctions liability. Even less care would not have justified a finding of malice." (emphasis added) (A36, p.7)

Although appellant officially states (appellant's br. p. 2) that the only issue on this appeal is whether Gertz requires a remand on the public interest issue, he goes on at great length (appellant's br., p. 7-15, p. 22-27), in an admittedly cute but patently meritless presentation, in an attempt to show that appellees have not proven beyond a reasonable doubt that each of the fifteen passages are true and thus defendants

must have published with actual malice*. Of course, the applicable standards are the exact opposite. It is the appellant who must prove each and every element of his cause of action by clear and convincing proof. [redacted] also prove at the very least that appellees entertained serious doubts about the truth of their publications. (see infra) Thus, whether each and every aspect of such passage is absolutely true is not at issue but only whether appellees published with knowledge of their falsity or with reckless disregard of their truth so as to constitute actual malice. As determined by the court below, the uncontested record establishes that even less care would not warrant a finding of actual malice.

A description of this extensive and meticulous verification process*** which was employed by appellees prior to

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* This confusion by appellant is somewhat understandable since in all the criminal cases in which he was involved this was the standard of proof which had to be met before his many convictions were imposed.

** In this regard, as previously stated, nothing in these 15 passages is any more heinous or damaging than the crimes and activities he has admitted to in his answer to appellees' interrogatories or for which he has been convicted.

*** Fawcett actually had nothing whatsoever to do with the writing of the book (or serialization thereof) in question. Yet, in addition to seeking certain assurances and making inquiries as to the steps Doubleday had taken to substantiate statements appearing in the chapters to be serialized, it took the extra precaution of also having the serialization reviewed by its attorneys. (Iversen aff'd., S 81-82).

publication of MY LIFE IN THE MAFIA is set forth in the Renner, Congdon, Callagy and Iversen affidavits (S 93, 83, 4 and 78 respectively) and is generally outlined in more detail under Facts, supra. Said affidavits and those of Teresa, and Federal Strike Force prosecutors Harrington Betz and Kramer, (S 101, 129, 131 and 133 respectively) establish the basis of appellees' belief that the publications were true and, at the very least, could not have been made with the knowledge of their falsity or with serious doubts as to their truth.

The standards for maintaining a successful cause of action for libel under the New York Times doctrine were enunciated by the Supreme Court in St. Amant v. Thompson, 390 U.S. 727 (1968). In St. Amant the court stated that "reckless conduct" is not measured by whether a reasonably prudent man would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained "serious doubts" as to the truth of his publication.

In St. Amant, the Supreme Court noted the reasons why the Louisiana Supreme Court in purporting to apply the New York Times malice standard had upheld the verdict that St. Amant had broadcast false information: The defendant had no personal

knowledge of the plaintiff's activities and relied solely on a union member's affidavit without proving his informer's reputation for veracity; he failed to verify the information with the union office which might have known the facts; and he gave no consideration to whether the statements defamed plaintiff, but went ahead mindless of the consequences. In reversing the verdict for the plaintiff, the Supreme Court held that the above reasons fell short of proving the defendant's reckless disregard for the accuracy of his statements because nothing indicated an awareness by the defendant of the probable falsity of his informer's statement about plaintiff.

As stated above, appellant must prove each and every element of his cause of action by clear and convincing proof, i.e., convincing clarity and not just by a preponderence of the evidence. (Garrison v. Louisiana, 375 U.S. 900 (1963); Firestone v. Time, Inc., 460 F. 2d 712(5th Cir.), cert. den., 409 U.S. 875, (1972).

Conversely, in this case, Doubleday and Fawcett, from their author Renner, who enjoyed an excellent reputation as an investigative organized crime reporter, and from various substantiation concerning the statements made about appellant such as his criminal record, Congressional testimony, indictments, and

FBI and police reports, had knowledge of the appellant's criminal activities. (S 31-77) Doubleday further attempted to verify the statements contained in the manuscript and both Doubleday and Fawcett submitted the manuscript to their attorneys for review (Congdon aff'd, S 86; Iversen aff'd. S 82). Renner himself took the extraordinary precaution of submitting the book to various Federal and state authorities for their comments on its accuracy. (Renner aff'd., S 98-100). Moreover, Teresa, since becoming a government witness and prior to the publication of the book had testified in trials on both the Federal and state levels resulting in over 45 convictions so that his reputation for veracity was excellent. (S 84-85, 129, 131 and 133). In fact, up to the time of publication, the government had not lost one case in which he was utilized as a witness. (S 85).

The New York Times case itself also establishes that as a matter of law appellant may not recover in this case. There a libel action was brought in an Alabama State Court by a public official against THE NEW YORK TIMES for publication of an advertisement describing the maltreatment of negro students who had protested segregation. The Supreme Court reversed the Alabama Supreme Court, which had affirmed the lower court's judgment against THE NEW YORK TIMES, holding that the following

facts were insufficient as a matter of law to constitutionally support an inference of malice: (1) a statement by the secretary of the newspaper that he thought that the advertisement was substantially correct and thus ignored the falsity of the advertisement (2) the newspaper's failure to retract upon plaintiff's demand, although it later retracted upon the demand of the Governor of Alabama; and (3) the fact that the publication was made without the newspaper's checking its accuracy against the news stories in its own files which would have shown the advertisement to be false.

The New York State Court of Appeals in Kent v. City of Buffalo, supra, also adopted the standards set forth by the Supreme Court to establish actual malice. The unanimous court, following the dissenting opinion of the Appellate Division opinion which it reversed, stated:

> "... that, although it did not appear that defendant WBEN failed to follow its normal and established procedures, the fact that it might not have done so did not show that it acted with reckless disregard of the truth; that reckless or wanton conduct meant publication of a falsehood with knowledge of its falsity or reckless disregard of whether or not it was false; that the use of plaintiff's picture could not be said to have been made with the high degree of awareness of its probable falsity demanded; that an inference of gross carelessness could not be drawn from the fact that a mistake was made, and that, since the record

> contained no evidence of reckless conduct, the verdict should be set aside and the complaint dismissed." (29 N.Y. 2d at 819)

(See also, Commercial Programming Unlimited v. CBS, Inc., supra.)

The facts in two other United States Supreme Court cases, Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) and Ocala and Star-Banner v. Damron, 401 U.S. 295 (1971), are most revealing in showing the extent of the conduct necessary to constitute actual malice. In Monitor Patriot, the author Drew Pearson, received information of the plaintiff's purported criminal record from an unverified source sometime between August 24-26. The charge of being a former bootlegger was not publicly made until September 10. Obviously, this was not a "hot news item" where the columnist or the newspaper did not have time to check out the story, and the alleged activities occurred some thirty-seven years before the publication.

However, the Supreme Court held that failure to check a story called in to a reporter by an unverified source did not constitute evidence of actual malice. Furthermore, remoteness in time of an alleged criminal activity did not have bearing on its relevance. The fact that there was a substantial span of time between receipt of the defamatory information and its actual publication, and that at least a cursory check of the

information is standard operating procedure in the newspaper industry where the matter involved is not an extraordinary "hot news item" carried no weight in the Supreme Court's final determination that reckless disregard of the truth was absent.

In this regard, it should be noted that appellant's contention that the actual malice standard should not apply to the two defendant authors is absolutely without basis or support. (Appellant br., p. 25) Neither St. Amant or Gertz have dicta, as appellant maintains, which could be remotely interpreted as limiting the application of the actual malice standards to persons once removed*. Appellees have been able to find no case, and appellant has certainly cited none, which would stand for the proposition that the actual malice standard is different for publishers and authors. Moreover, even if such a distinction did exist, it was impliedly rejected by the Supreme Court in Monitor Patriot when it refused to give any weight in a determination concerning actual malice to the fact that alleged libelous statements were not "hot news items."

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* Parenthetically, even if this contention were true and if all other reasons which mandated dismissal were not present, this argument would not apply to defendant Renner because he is also a person once removed.

In the Star-Banner case, where a check of the facts to determine the truth of the statement was usually made; and the fact that the editor who printed the story had close to forty years experience in the newspaper business and, therefore, was clearly aware of the standard operating procedures; and lastly, the failure to make such an investigation, examined collectively, still failed to constitute any evidence of "recklessness". The court implicitly reaffirmed its conviction that actual malice must be of "convincing clear clarity" [New York Time v. Sullivan, 376 U.S. at 285-86; Beckley Newspapers Corp. v. Hanks, 389 U.S. at 83 (1967)], and that mere negligence in operation is insufficient to constitute "reckless disregard" for truth.

Before the New York Times case, "actual malice" meant ill will, spite or intent to injure--all of which are lacking in the instant situation. Moreover, the above-cited Supreme Court authority has held that the common law definition was constitutionally inadequate and defined "actual malice" as being a knowing falsehood or one uttered with serious doubts as to its truth. In short, negligence or investigatory failure is not an independent ground for recovery under New York Times nor is it an evidence of "malice" within the meaning of New York Times. Thus, if the defendant does not know that the statement

is false, he must publish with "reckless disregard", and the failure to check the accuracy of the information published with material that happens to be in the defendant's possession (New York Times Co. v. Sullivan, supra); the lack of ordinary care in making charges against the plaintiff (Garrison v. Louisiana, supra); the failure to make a prior investigation of the facts (St. Amant v. Thompson, supra); and mere negligence (New York Times Co. v. Sullivan) is not sufficient. The failure to substantiate information supplied by an unverified informer did not constitute malice in the Monitor Patriot case and reliance upon an anonymous phone call did not constitute malice in the Firestone v. Time, Inc., supra.

Based on the foregoing authority, the evidence in this case is wholly lacking to support a finding that the appellees published with "actual malice". Here, Doubleday and Fawcett not only followed their normal and established procedure to verify the truth of the statements complained of, but they and Renner went beyond all ordinary attempts to insure that the statements contained in this manuscript were accurate. Moreover, Teresa, who enjoyed an excellent reputation for veracity, had personal knowledge of all statements made about the plaintiff. (S 102-03, 129, 131 and 133)

In conclusion, all evidence submitted in support of

the motion for summary judgment below indicated that the statements complained of were true. From a realistic point of view, there is no way that appellant could prove otherwise, and especially not with convincing clarity. At the very least, these statements were not made with a high degree of awareness of probably falsity, serious doubts or with deliberate falsification or reckless publication despite the publisher's awareness of probable falsity or under any other circumstances which would permit a plaintiff to recover according to the actual malice standards espoused by the United States Supreme Court. Therefore, as a matter of law, the alleged libelous publications were not made with actual malice and the court below was correct in summarily dismissing appellant's complaint.

POINT IV

THE COMPLAINT COULD ALSO BE DISMISSED BECAUSE THERE IS NO BASIS OR GOOD CAUSE FOR THE CLAIMS ASSERTED NOR LIKELIHOOD OF SUCCESS SINCE APPELLANT IS LIBEL-PROOF

As is stated earlier in this memorandum and as is more fully set forth in the affidavits submitted in support of the motion below, appellant is a habitual criminal whose record demonstrates a life devoted to crime. (See, e.g., S 31-77, S 129, 131, 133). He is admittedly presently incarcerated in a

Federal Penitentiary serving a 21-year sentence. Under these facts, the court below could also have dismissed the appellant's complaint as frivolous at the inception of the litigation in order to conserve the court's time and to save needless expense in defending this action*.

Indeed, although the district court did not specifically reach this issue since the complaint was dismissed, by calling this action a "frivolous libel su[illegible]" (A 36, p.7), it indicated that had it been necessary, it would have dismissed on these grounds.

In Urbano v. News Syndicate Co., 358 F. 2d 145 (2d Cir., 1966) the plaintiff was also an incarcerated prisoner who brought a libel action against the defendant. In a dissent which was eventually upheld by the Second Circuit (see below) Chief Judge Lombard stated:

> "... It taxes credulity to assume that one serving a life sentence for robbery-murder could prove that a newspaper article contributing to him other crimes of a like nature either injured his reputation or caused him 'pain and suffering' to any meaningful extent.
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> * * * * * * *
>
> "I would go one step further and hold that this claim, while technically 'actionable', is so devoid of merit on its facts as heretofore alleged that it should not be permitted

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* Analogous authority for this proposition is provided by 28 USCA §1915 (d).

> to go to trial at the public's expense.** While the federal courts should not permit incarceration effectively to deprive criminals of access to federal diversity jurisdiction to redress wrongs committed against their persons, either in prison or out, it is also important not to encourage suits by inmates that are instituted merely to harass public officials or publishers, to clutter the courts, or to provide a break in the monotony of prison life." (emphasis added) (dissent at 147)

In Urbano v. Sondern, 41 F.R.D. 355 (D. Conn. 1966) aff'd. 370 F. 2d 13, cert. den. 386 U.S. 1034, two separate libel actions brought by the same plaintiff as the above-cited Urbano case were dismissed where the court determined that the actions were frivolous and appeared to patently lack merit. In Urbano, the district court stated:

> "If the suit is frivolous and if the chances of success are highly dubious at best, the court has an interest in protecting its forum from being abused by persons who are unable to pay costs or give security thereof. (citations omitted). A defendant should not be put to the burden of further defending such suits if it becomes apparent that there is little, if any, likelihood of the plaintiff prevailing." (Id. at 358)

The Second Circuit, this time upholding the dismissal of the plaintiff Urbano's libel in per curiam decision stated as follows:

> "... we conclude that this action was properly dismissed as frivolous both for the reasons set forth in Judge Zampano's well-reasoned

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** In the instant action, even the appeal is being permitted at the public's expense.

> decision 41 F.R.D. 355, and because it seems highly unlikely that appellant, who has adduced no specific facts tending to show that he did not commit the crimes mentioned in defendant's article, could surmount either the defense of truth or to clarify privilege to reporting activities of public officials."

Mattheis v. Hoyt, 136 F. Supp. 119 (W.D. Mich. 1955) also involved an analogous situation. An inmate of the state prison, serving a life sentence for murder, sued a magazine and individuals for defamation and sought damages allegedly resulting from an article about the crime for which he was convicted. The Court stated:

> "It is obvious that the publication of the article in question four years after plaintiff's conviction of a brutal murder of a young girl, even though it might have been in part true as to his admission of guilt, certainly did not affect or damage his reputation, unless possibly among his criminal associates in prison." (Id. at 124)

Thus, as an incarcerated prisoner with little or no reputation to protect, (and even though he may not be proceeding under §1915), these cases provide additional authority that in situations such as the instant one, a complaint for libel by a prisoner can be dismissed at its inception when there is no good cause for the claims asserted in it and it is patently frivolous.

Moreover, although the Gertz decision was discretion-

ary with respect to the applicability of the actual malice standard in public interest libel actions (see Point I), it did mandate the imposition of new damage standards in these same type actions. Thus, the Court clearly held that in any public interest libel action in which a plaintiff has failed to show actual malice that recovery must be limited to "compensation for actual injury" (418 U.S. at 349). Because of appellant's incarceration, criminal record and sordid past and because even if something in the book proved totally false it would be no worse than the crimes for which he has been convicted, it is inconceivable that appellant could have suffered actual damages.

Thus, as a matter of law, appellant is "libel proof" and the court below could properly have dismissed the complaint on this ground.

POINT V

SUMMARY JUDGMENT IS PARTICULARLY APPROPRIATE IN THIS CASE.

As a corollary to the Constitutional privilege of free expression secured by the First and Fourteenth Amendments, the courts in libel actions have recognized the need for affording summary relief to defendants. Thus, irrespective of the caution with which courts may approach motions for summary judgment in

other contexts, there has been repeated judicial recognition that such motions should--indeed must--be readily granted where the Constitutional privilege is applicable.

It is necessary that frivolous libel suits be dismissed summarily to avoid the "chilling effect" on freedom of speech and press an expensive defense entails. Dombrowski v. Pfister, 380 U.S. 479, 487 (1965). As the court observed in Cerrito v. Time, Inc., 302 F. Supp. 1071 (N.D. Cal., 1969), aff'd., 449 F. 2d 306 (9th Cir. 1970):

> "Summary judgment is an integral part of the constitutional protection afforded defendants in actions such as this." (Id., at 1075)

Thus, the First Amendment guarantee requires that summary judgment be granted as soon as it becomes clear that a plaintiff cannot establish "actual malice" with the convincing clarity required. See, Washington Post Co. v. Keogh, 365 F. 2d 965 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967); Bon Air Hotel, Inc. v. Time, Inc., 426 F. 2d 858 (5th Cir. 1970); Treutler v. Meredith Corporation, 455 F. 2d 255 (8th Cir. 1972); Time, Inc. v. Johnston, 448 F. 2d 378 (4th Cir. 1971) (denial of summary judgment reversed); Dacy v. Florida Bar, Inc., 427 F. 2d 1292 (5th Cir. 1970) (denial of summary judgment reversed); Time, Inc. v. McLaney, 406 F. 2d 565 (5th Cir. 1969); Thuma v.

Hearst Corporation, 340 F. Supp. 867 (D. Md. 1972); Novel v. Garrison, 338 F. Supp. 977 (N.D. Ill. 1971); Alexander v. Lancaster, 330 F. Supp. 341 (W.D. La. 1971); Twenty-five East 40th Street Restaurant Corporation v. Forbes, 30 N.Y. 2d 595, 282 N.E. 2d 118, 331 N.Y.S. 2d 29 (1972) (denial of summary judgment reversed); News-Journal Company v. Gallagher, 233 A. 2d 166 (Sup. Ct. Del. 1967) (denial of summary judgment reversed); Gilberg v. Goffi, 21 App. Div. 2d 517, 251 N.Y. Supp. 2d 823 (2nd Dep't 1964), aff'd, 15 N.Y. 2d 1023 (1965); United Medical Laboratories v. Columbia Broadcasting System, 404 F. 2d 706 (9th Cir. 1968); Commercial Programing Unlimited v. CBS, Inc., supra.

In short, the time and expense which would have been involved in the adjudication of appellant's claims for libel was and is unwarranted in light of the fact, as herein demonstrated, that appellees, as a matter of law, must prevail. Much time and expense has already been expended on this baseless law suit which the court below called "frivolous" on two occasions. (A 36, p.7, A 38) The district court was keenly aware of the above cited authority, and after discussing same, further held:

> "I am satisfied that if the pro se plaintiff had been a learned lawyer he could not have overcome the force of the authorities cited." (A 36, p.8)

Moreover, an affirmance is even more appropriate when it is considered that appellant, a convicted and incarcerated criminal, is prosecuting this appeal from a baseless civil action at the public's expense.

Thus, it is unequivocally clear that it was appropriate for the court below to dispose of appellant's complaint by way of summary judgment.

CONCLUSION

FOR ALL THE FOREGOING REASONS, IT IS RESPECTFULLY REQUESTED THAT THE DECISION AND JUDGMENT BE AFFIRMED IN ALL RESPECTS.

Respectfully submitted,

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SERVICE OF 2 COPIES OF THE WITHIN

Appellees Brief

IS HEREBY ADMITTED.

DATED:

Attorney for Appellee